

EXHIBIT B

NlVsHER1

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x
4 HERMÈS INTERNATIONAL. et al.,

5 Plaintiffs,

6 v.

22 Civ. 384 (JSR)

7 MASON ROTHSCHILD,

8 Defendant.
9 -----x

New York, N.Y.
January 31, 2023
9:30 a.m.

10 Before:

11 HON. JED S. RAKOFF,

12 District Judge
13 -and a Jury-

14
15 APPEARANCES

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24
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Nlvnher2

Mentzer - Cross

1 The images that we have seen of the MetaBirkins, the colorful
2 imaginary Birkin fur bags, those are the images that you --
3 those are what you mean when you talk about MetaBirkins NFTs,
4 correct?

5 A. That is correct.

6 Q. And the MetaBirkins NFTs are flat, two-dimensional digital
7 pictures, correct?

8 A. At this time, yes.

9 Q. So they are not virtual wearables in the sense that some
10 fashion companies are putting out virtual wearables in virtue
11 worlds, is that correct?

12 A. That's correct.

13 Q. And they are not useable as handbags in the sense that 3D
14 digital objects are usable in certain digital environments,
15 correct?

16 A. Not with current technology, no.

17 Q. Did you follow what was going on in the world of NFTs in
18 2021?

19 A. I did.

20 Q. Would it be fair to say that in 2021, the majority of NFTs
21 being sold were, and traded were digital art NFTs?

22 A. I would classify them as digital collectibles, but very
23 similar, yes.

24 Q. And what's the difference to you between digital art and
25 digital collectibles?

Nlvnher2

Mentzer - Cross

1 Q. And those MetaBirkins NFTs were associated with this image
2 for less than 24 hours, am I right about that?

3 A. That's correct.

4 Q. So soon after minting was completed, the veiled image here
5 was replaced by the 97 unique MetaBirkins images, is that
6 right?

7 A. All 100, yes.

8 Q. All 100.

9 And those 100 MetaBirkins images have remained the
10 same from approximately December 3, 2021, to today, haven't
11 they?

12 A. Yes, they have.

13 Q. Are you aware that Mr. Rothschild publicly previewed the
14 MetaBirkins images in the weeks leading up to the NFT minting?

15 A. I am not.

16 Q. Did you do any research to see whether he might have shown
17 the MetaBirkins images before minting took place?

18 A. The only research I did was to look at news articles so I
19 could know what I was looking for.

20 Q. Did you ever look at the MetaBirkins website?

21 A. Probably at some point, yes.

22 Q. Have you looked at any communications from the MetaBirkins
23 Discord server?

24 A. No, I have not.

25 Q. Did you ever look at the MetaBirkins Instagram page?

Nlvnher2

Martin - Direct

1 is invaluable.

2 Q. I'm sorry. Did you say "unvaluable" or "invaluable"?

3 A. Invaluable. Sorry, sorry.

4 Q. How many product does Hermès offer?

5 A. I would say thousands.

6 Q. And where do the Birkin products rate in terms of how they
7 sell?

8 A. Where are they sold you mean?

9 Q. No.

10 A. Sorry.

11 Q. No. Not geographically. Where do Birkin bags rank --

12 A. Ah, sorry.

13 Q. -- in the scheme of the product offered by Hermès?

14 A. As I said, for us it's our best selling product.

15 Q. Can you tell us a little bit about the customer demand for
16 the Birkin?

17 A. It's very high.

18 Q. What do you mean by that?

19 A. I mean that it's so high that we are unable to satisfy all
20 the demand.

21 Q. Does Hermès have a position on why the Birkin bag has been
22 successful?

23 A. Of course, because of its design, because of its -- the raw
24 material that we use, which is a very high quality, because of
25 the craftsmanship that is used, the know-how that is used to

Nlvnher2

Martin - Direct

1 manufacture the same, and because it became like a status
2 symbol.

3 Q. Does Hermès have an idea about how -- let me ask it
4 differently. Does Hermès know how customers use their Birkin
5 bags?

6 A. I mean, they are various ways that you use a bag. Of
7 course, first it's a bag, so it's something that you can wear
8 you can put your items in it. I think as I mentioned earlier,
9 the Birkin bag is more than a bag. It is something that you
10 own, that you are proud to show, that you are engaged with, so
11 the way of living is also to own the same.

12 (Continued on next page)

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Nlvnher4

Martin - Direct

1 A. In Challenges.

2 Q. Did Hermès interact with Mr. Rothschild before sending the
3 cease and desist letter?

4 A. No.

5 Q. Has Hermès interacted with Mr. Rothschild since he sent
6 that letter, since Hermès sent that letter?

7 A. No.

8 Q. Did Hermès ever publicize the cease and desist letter it
9 sent to Mr. Rothschild?

10 A. No.

11 Q. Did Hermès tell anybody in the media about the cease and
12 desist letter it sent Mr. Rothschild?

13 A. Apart from asking the Challenge Media to correct the
14 article, no.

15 Q. My question was whether Hermès ever sent the cease and
16 desist letter to the media?

17 A. No. Sorry.

18 Q. Has Hermès been contacted to comment on this case?

19 A. Yes.

20 Q. Has Hermès ever commented on this case?

21 A. No.

22 Q. Yesterday during openings both sides referred to and I
23 think Mr. Millsaps showed a video, something called "The Baby
24 Birkin."

25 Have you ever seen that before?

Nlvnher4

Martin - Direct

1 Q. Okay. Other than counterfeiting, you know, like stuff you
2 might see a few blocks from here, do you know the last time
3 Hermès brought a trademark infringement lawsuit in the U.S.?

4 A. I am only aware of one case more than 20 years ago.

5 Q. Before we saw a few -- we have seen a few articles that
6 we've shown the jury, some of those articles, and has Hermès
7 ever sent a cease and desist to the people that published those
8 articles?

9 A. No.

10 Q. Has Hermès ever sued anybody for using the Birkin bag in
11 those articles?

12 A. No.

13 Q. We also saw Mr. Chavez introduce the exhibit which the jury
14 will see which has the Hermès bag in various movies and films.

15 Are you familiar with that exhibit?

16 A. Yes.

17 Q. Has Hermès ever sent a cease and desist letter to any of
18 those users of the Birkin trademark or bag?

19 A. No.

20 Q. Did Hermès ever bring a lawsuit about those?

21 A. No.

22 Q. Have you ever seen artists' paintings of Birkin bags?

23 A. Yes.

24 Q. Did you ever send a cease and desist letter to the artists
25 who painted pictures of the Birkin bags?

Nlvnher4

Martin - Direct

1 galleries?

2 A. Some of them, yes.

3 Q. Did Hermès ever send a cease and desist letter to those
4 galleries?

5 A. No.

6 Q. Did Hermès ever sue those galleries?

7 A. No.

8 Q. We heard some of the cross-examination by Mr. Oppenheim of
9 Mr. Chavez talking about the different numbers. Do you
10 remember that from yesterday?

11 A. Different newspapers?

12 Q. No, I'm sorry. There was a financial table that both
13 Mr. Oppenheim and I questioned Mr. Chavez about.

14 Do you remember that?

15 A. Yes, sorry.

16 Q. That generally was a picture of Hermès financial -- sales
17 information, correct?

18 A. Yes.

19 Q. Its revenues from sales?

20 A. Yes.

21 Q. Okay. Do you know whether the sale of the Birkin handbags
22 suffered as a result of the MetaBirkins NFTs?

23 A. I don't know.

24 Q. Do the Birkin handbag sales increase every year?

25 A. Yes.

Nlvnher4

Martin - Direct

1 Q. Did the sales of the Birkin bags increase from 2020 to
2 2021?

3 A. Yes.

4 Q. And did the Birkin bag sales increase last year from 2021
5 to 2022 after the MetaBirkins were released?

6 A. I think, yes.

7 Q. Does Hermès believe it's been damaged by the MetaBirkins
8 NFTs?

9 A. Yes.

10 Q. How so?

11 A. We consider that there's been confusion in the consumers
12 and that our brand has been diluted, and Birkin being one of
13 the most important brands for the group, we think we have
14 suffered damages in relation to this brand dilution and the
15 consumer confusion.

16 MR. MILLSAPS: Your Honor, objection. We move to
17 strike the witness's testimony insofar as he just testified
18 about consumer confusion because there is no evidence admitted
19 of consumer confusion.

20 MR. WARSHAVSKY: I am happy to respond or sidebar,
21 your Honor.

22 THE COURT: Overruled.

23 The objection is overruled.

24 MR. WARSHAVSKY: Thank you, your Honor.

25 BY MR. WARSHAVSKY:

Nlvnher4

Martin - Cross

1 Q. Today that's correct?

2 A. Yeah.

3 Q. Mr. Martin, there's no evidence that Mr. Rothschild ever
4 told anyone that MetaBirkins came from Hermès, isn't that
5 right?

6 MR. WARSHAVSKY: Objection.

7 THE COURT: Well, as phrased, sustained.

8 BY MR. MILLSAPS:

9 Q. Mr. Martin, are you aware of any evidence that
10 Mr. Rothschild ever told anyone that the MetaBirkins came from
11 Hermès?

12 A. No.

13 Q. Mr. Martin, you were just testifying that Hermès has been
14 damaged by consumer confusion, is that right?

15 A. Yes.

16 Q. What is the evidence of consumer confusion that you have
17 seen?

18 A. I think we have an expert report on consumer confusion. I
19 can also refer to Mr. Bob Chavez' testimony, which if I
20 remember correctly mentioned that some of his students were
21 confused.

22 I have seen articles in the press media saying that
23 this project was made in partnership, made by Hermès, and I
24 anticipate that the people that, when you read a newspaper, you
25 can believe that what is written in the newspaper is true, and

Nlvnher4

Martin - Cross

1 we have had one case of consumer confusion, but I understand
2 it's a French case, so it is not relevant here.

3 Q. So, if I understand what you just said, it's fair to say
4 that Hermès has no evidence of an actual consumer in the U.S.
5 being confused about the source of MetaBirkins?

6 MR. WARSHAVSKY: Objection.

7 Q. Is that correct?

8 THE COURT: Hold on.

9 Sustained.

10 BY MR. MILLSAPS:

11 Q. Mr. Martin, are you aware of any evidence that an actual
12 consumer of Hermès' products was confused about the source of
13 MetaBirkins?

14 A. I mentioned the student from Mr. Bob Chavez' testimony, and
15 if we relate to outside -- is it related only to the U.S., your
16 question, sir?

17 Q. Yes, I asked in the U.S.

18 A. Sorry. So I only refer to the case, to the testimony of
19 Mr. Chavez.

20 MR. MILLSAPS: Ashley, could you put up Plaintiff's
21 Exhibit No. 227, which is in evidence.

22 BY MR. MILLSAPS:

23 Q. Mr. Martin, am I correct that this is a screen shot of the
24 MetaBirkins website as of December 1, 2021?

25 A. Yes.

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Martin - Cross

AFTERNOON SESSION

1:50 p.m.

(Jury not present)

THE COURT: So this is not our day for jury promptness. Apparently one of the jurors still has not returned from lunch, so we'll wait a few minutes to hear what the story is.

Let's get the witness on the stand and stand for the jury.

(Jury present)

All right. Counsel.

CROSS-EXAMINATION

BY MR. MILLSAPS:

Q. Ashley, would you please put on the screen Plaintiff's Exhibit No. 20, which is in evidence.

Mr. Martin, who sent this cease and desist letter to Mr. Rothschild?

A. Our lawyers.

Q. And your lawyers are your agents, correct?

A. What do you mean by agent?

Q. Your lawyers act on Hermès' behalf at your direction and control, is that right?

A. Yes.

Q. So you directed them to send this letter to Mr. Rothschild, correct?

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Martin - Cross

1 A. Yes.

2 Q. Do you remember testifying earlier today that Hermès had no
3 contact with Mr. Rothschild after sending him the cease and
4 desist letter?

5 A. Yes.

6 Q. Isn't it a fact that Mr. Rothschild sent a response to this
7 cease and desist letter through his lawyers just a few days
8 after he received it?

9 A. Yes, he answered.

10 Q. Would you please look at the document in your binder that's
11 been premarked as Plaintiff's Exhibit 21.

12 Do you recognize this document, Mr. Martin?

13 A. Yes.

14 Q. What is this document?

15 A. It's the answers from Mr. Rothschild to our attorney.

16 Q. So, in fact, you did have some contact with Mr. Rothschild
17 after sending your cease and desist letter, is that right?

18 A. Through our attorneys, yes.

19 Q. And your attorneys are effectively Hermès, correct?

20 A. Yes.

21 MR. MILLSAPS: Your Honor, I offer Plaintiff's Exhibit
22 No. 21 into evidence.

23 MR. WARSHAVSKY: No objection, your Honor.

24 THE COURT: Received.

25 (Plaintiff's Exhibit 21 received in evidence)

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Martin - Cross

1 BY MR. MILLSAPS:

2 Q. Mr. Rothschild's lawyers are his agents as well as far as
3 you understand, isn't that right, Mr. Martin?

4 A. Yes.

5 MR. MILLSAPS: Ashley, would you please show this
6 document to the jury now.

7 Q. So communications from Mr. Rothschild's lawyer are
8 effectively communications from Mr. Rothschild, isn't that fair
9 to say?

10 A. Yes.

11 Q. Looking at this letter, isn't it the case that
12 Mr. Rothschild, through his lawyers, explained to Hermès that
13 MetaBirkins are artistic works depicting fur-covered Birkin
14 bags?

15 A. Yes.

16 Q. Now, you testified that Hermès sent its cease and desist
17 letter after you discovered that Mr. Rothschild was planning to
18 release more MetaBirkins NFTs, is that right?

19 A. Sorry. Can you repeat the question?

20 Q. Am I right that you testified that Hermès sent its cease
21 and desist letter to Mr. Rothschild after you discovered that
22 Mr. Rothschild was planning to release more MetaBirkins NFTs?

23 A. Yes.

24 Q. And am I right that you testified that you sent the cease
25 and desist letter after you discovered that Mr. Rothschild was

N1VsHER5

Martin - Cross

1 fur-covered horse charm, isn't that right?

2 A. If my memory is correct, yes.

3 Q. So, Mr. Martin, before lunch you then testified, correct me
4 if I'm wrong, that Hermès sent Mr. Rothschild a cease and
5 desist letter when it discovered these plans, but then had no
6 further contact with Mr. Rothschild; was that your testimony?

7 A. Yes, but for me, the answer from was not part -- I mean,
8 what I wanted to say -- perhaps I did it wrong -- is that I
9 had no direct contact with Mr. Rothschild after the cease and
10 desist letter. He answered through his lawyers, through his
11 lawyers. But I had no contact, Hermès had no direct contact
12 with Mr. Rothschild. That was the way I understood for me.

13 Q. So you don't consider contact through your lawyers who are
14 working as your agents to be Hermès having contact with
15 Mr. Rothschild?

16 MR. WARSHAVSKY: Objection.

17 THE COURT: Sustained.

18 I think he's indicated that he, all he was saying was
19 that he didn't have direct contact with Mr. Rothschild. The
20 jury can see that there were letters sent in both directions,
21 all containing the sweet nothings that are typical of lawyers'
22 letters.

23 MR. MILLSAPS: Your Honor, I would like to ask for a
24 sidebar before I continue with my questioning.

25 THE COURT: Sure.

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Martin - Cross

1 (In open court)

2 BY MR. MILLSAPS:

3 Q. Mr. Martin, isn't it true that Mr. Rothschild not only
4 promptly responded to Hermès' cease and desist letter with a
5 letter from his own lawyers, but he also engaged in discussions
6 with Hermès about possible settlement?

7 THE COURT: You mean through his lawyers?

8 Q. Through his lawyers?

9 A. I think, yes.

10 Q. And are you aware if those conversations had concluded
11 before Hermès filed this lawsuit?

12 THE COURT: Sustained.

13 Q. Those settlement discussions obviously did not result in a
14 settlement, isn't that right, Mr. Martin?

15 THE COURT: If what you mean is that the matter, since
16 it hasn't been settled, has been left to the good judgment of
17 our jury, I think I can take judicial notice of that.

18 MR. MILLSAPS: Thank you, your Honor.

19 BY MR. MILLSAPS:

20 Q. Mr. Martin, when Hermès filed this lawsuit against
21 Mr. Rothschild, Mr. Rothschild was represented by the lawyers
22 that sent the response to the cease and desist letter, isn't
23 that right?

24 MR. WARSHAVSKY: Objection.

25 THE COURT: Unless there was earlier contact, I don't